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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BURLINGTON NORTHERN RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; THE KANSAS AND MISSOURI RAILWAY AND TERMINAL COMPANY; UNION PACIFIC RAILROAD COMPANY; ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY, a subsidiary of Union Pacific Railroad Company; and MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioners,

v.

C. MICHAEL LENNEN, Secretary of Revenue of the Department of Revenue of the State of Kansas; PHILIP W. MARTIN, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas; and THE DEPARTMENT OF REVENUE OF THE STATE OF KANSAS, an administrative agency of the State of Kansas,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether plaintiffs seeking relief from discriminatory state taxation under 49 U.S.C. § 11503 must prove purposeful overvaluation of their property by state officials with discriminatory intent where:

a. The language of 49 U.S.C. § 11503 does not require any showing of intentional discrimination by state officials; and

b. A requirement to prove intentional discrimination will, as a practical matter, permit states to negate Congress' purposes in enacting 49 U.S.C. § 11503.

LIST OF PARTIES TO THIS PROCEEDING

Petitioners (hereinafter referred to as the "railroads") are listed in the caption. The parents, subsidiaries (other than wholly owned subsidiaries) and affiliates of these railroads are numerous and are listed in Appendix I. All respondents (other than certain county-intervenors) are listed in the caption. The county-intervenors are the following counties of the State of Kansas: Bourbon, Decatur, Elk, Franklin, Gove, Lane, Linn, Marshall, Miami, Norton, Phillips and Pratt.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (reprinted in Appendix A) is reported at 715 F.2d 494. The opinion of the United States District Court for the District of Kansas, dated December 9, 1982 (reprinted in Appendix B) is unreported. The district

court's order, dated December 1, 1982, (reprinted in Appendix C) is also unreported.

JURISDICTION

The judgment of the Tenth Circuit which is sought to be reviewed (reprinted in Appendix A) is dated August 25, 1983. The order of the Tenth Circuit denying the railroads' timely petition for rehearing and suggestion for rehearing in banc (reprinted in Appendix D) is dated September 28, 1983. The order of the Tenth Circuit staying its mandate until November 14, 1983 (reprinted in Appendix E), is dated October 13, 1983.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (1976), now codified at 49 U.S.C. § 11503.

The language of 49 U.S.C. § 11503 as codified differs from the language of Section 306. However, the codification cannot be construed as making any substantive change to the meaning of Section 306. *See* Pub. L. No. 95-473, § 3(2), 92 Stat. 1466 (1978).

In a previous decision under 49 U.S.C. § 11503, *Atchison, Topeka & Santa Fe R.R.* v. *Lennen*, 640 F.2d 255, 258 (10th Cir. 1981), the Tenth Circuit held that the language of Section 306 governs issues of statutory construction. In deciding this case, the Tenth Circuit utilized the language of Section 306, rather than 49 U.S.C. § 11503. *Burlington Northern R.R.* v. *Lennen*, 715 F.2d 494, 496 n. 1 (10th Cir. 1983) (Appendix A, p. 2a).

In accordance with the practice of the Tenth Circuit, the railroads will refer in this petition to the language of Section 306. Its provisions are reprinted in Appendix F; the provisions of 49 U.S.C. § 11503 are reprinted in Appendix G.

STATEMENT OF THE CASE

Section 306 prohibits discriminatory state taxation of rail transportation property without regard to the intent of state officials. Discrimination under the Act may arise from the overvaluation of rail transportation property, from the underassessment of other commercial and industrial property, or from a combination of both factors.

In this case, the Tenth Circuit has held that, notwithstanding the absence of any statutory requirement to show discriminatory intent, plaintiffs in Section 306 cases must demonstrate such intent on the part of state officials in order to obtain relief from discriminatory overvaluation of their property. If allowed to stand, the Tenth Circuit's decision will permit states to substitute one form of tax discrimination for another and will frustrate Congress' purpose in enacting Section 306.

a. The Purpose Of Section 306.

The purpose of the Railroad Revitalization and Regulatory Reform Act ("4-R Act") was "to promote the revitilization of the railroad industry in the United States."[1] Congress found that railroads were in poor financial condition, that they had insufficient funds to maintain and upgrade their facilities, and that this greatly diminished the railroads' ability to provide necessary

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[1] S. Rep. No. 94-499, 94th Cong., 2d Sess. p. 1 (1976), reprinted in 1976 *U.S. Code Cong. & Ad. News*, p. 14.

services to the public and adversely affected the nation's economy.[2] The 4-R Act was intended to eliminate many of the regulatory and financial burdens imposed on the railroad industry.[3]

Discriminatory state taxation of railroad property was one of Congress' principal concerns. As reported by one congressional committee:

> [R]ailroads are over-taxed by at least $50 million each year. In view of the generally poor economic condition of the railroad industry and the effect such economic hardship is having on the ability of the industry to adequately serve our national rail transportation needs, the Committee believes discriminatory property . . . taxation should be ended.[4]

Congressional committees also noted that railroads are easy prey for state and local tax assessors, since they are "nonvoting, often nonresident, . . . and cannot easily remove their right of way and terminals."[5] After extensive investigation, Congress concluded that the national interest required the prohibition of discriminatory state taxation of railroads. Congress also concluded that, in order to efficiently and effectively enforce this prohibition, federal courts should be given jurisdiction to prevent state tax discrimination against railroad property.[6] Thus, Section 306, which is the culmination of fifteen

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[2] *Ibid*, p. 2-3.

[3] *Ibid*, p. 4.

[4] H.R. Rep. No. 94-725, 94th Cong., 1st Sess. p. 78 (1975).

[5] S. Rep. No. 91-630, 91st Cong., 1st Sess. p. 3 (1969).

[6] *See Southern Railway Co.* v. *State Board of Equalization*, 715 F.2d 522, 529 (11th Cir. 1983).

years of Congressional consideration,[7] prohibits states from assessing discriminatory taxes against railroad property and creates a specific exception to the Tax Injunction Act.[8]

b. Relevant Provisions Of Section 306.

Section 306(1) prohibits four acts which, in the language of the statute, "constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce."[9] This litigation arises under Section 306(1)(a), which states:

> It is unlawful for a State, a political subdivision of a State, or a government entity or person acting on behalf of such State of subdivision to commit . . .
>
> (a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same

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[7] *See* S. Rep. No. 87-445, 87th Cong., 1st Sess. (1961); H.R. 7421, 87th Cong., 1st Sess. (1961); H.R. 7497, 87th Cong., 1st Sess. (1961); H.R. 736, 88th Cong., 1st Sess. (1963); H.R. 4972, 89th Cong., 1st Sess. (1965); S. 2988, 89th Cong., 2d Sess. (1966); H.R. 1480, 90th Cong., 1st Sess. (1967); S. 927, 90th Cong., 2d Sess. (1968); S. Rep. No. 1483, 90th Cong., 2d Sess. (1968); S. 2289, 91st Cong., 1st Sess. (1969); S. Rep. No. 91-630, 91st Cong., 1st Sess. (1969); H.R. 16245, 91st Cong., 2d Sess. (1970); S. 2841, 92nd Cong., 1st Sess. (1971); S. 3945, 92nd Cong., 2d Sess. (1972); S. Rep. No. 92-1085, 92nd Cong., 2d Sess. (1972); S. 1891, 93d Cong., 1st Sess. (1973).

[8] 28 U.S.C. § 1341.

[9] See Appendix F, §§ 306(1)(a), (b)(c) & (d).

assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

"Assessment" is defined by the Act as "valuation for purposes of a property tax levied by any taxing district."[10] "Transportation property" is defined as property which is "owned or used by a common carrier by railroad subject to [the Interstate Commerce Act]."[11] "Commercial and industrial property" is defined as "all property, real or personal, other than transportation property and land used for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy."[12]

In essence, Section 306(1)(a) establishes a simple equation to which states must adhere in taxing rail transportation property:

Assessed Value of Rail Transportation Property		Assessed Value of All Other Commercial and Industrial Property
True Market Value of Rail Transportation Property	Must Not Exceed	True Market Value of All Other Commercial and Industrial Property.

[10] See Appendix F, § 306(3)(a).

[11] See Appendix F, § 306(3)(d).

[12] See Appendix F, § 306(3)(c).

Under this statutory formula, discrimination exists whenever a railroad's assessed value relative to its true market value exceeds the assessed value of commercial and industrial property relative to its true market value. "True market value" is the standard to which assessments of both rail transportation property and commercial and industrial property must be compared. Without calculating the ratio on the left-hand side of the Section 306 equation (which clearly necessitates a determination of the true market value of rail transportation property), one obviously cannot make the comparison of assessment ratios which the statute requires.

Section 306(2) confers jurisdiction upon district courts of the United States, notwithstanding 28 U.S.C. § 1341 and without regard to amount in controversy or citizenship of the parties, to "grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of [Section 306]." No conditions are imposed upon the exercise of such jurisdiction, except that the ratio of assessed value to true market value of transportation property must exceed the ratio applicable to commercial and industrial property by at least 5 per cent.[13]

c. Prior Section 306 Litigation In Kansas.

In 1980, five separate Section 306 cases were filed in the United States District Court for the District of Kansas by eleven Kansas railroads, six of which are petitioners in this case. In all five cases, the railroads sought preliminary and permanent injunctive relief prohibiting Kansas officials from collecting ad valorem taxes upon the

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[13] See Appendix F, § 306(2)(c).

railroads' property in violation of Section 306 for the 1980 tax year.

In each of these cases, the railroads did not challenge the values that Kansas officials had assigned to their property for ad valorem tax purposes. The left-hand side of the Section 306 equation was essentially stipulated by the parties and the proof focused primarily upon the right-hand side of the equation. In each of these cases, the railroads alleged that their property had been assessed at a ratio of assessed value to true market value of 30%[14] while locally-assessed commercial and industrial property had been assessed at approximately 12%.

On April 15, 1982, the district court issued its decision permanently enjoining Kansas officials from levying or collecting ad valorem taxes on rail transportation property for the 1980 tax year at a ratio of assessed value to true market value greater than 12.4% (the average ratio at which locally-assessed commercial and industrial property had been assessed in Kansas for the 1980 tax year). *Atchison, Topeka & Santa Fe Ry.* v. *Lennen*, 552 F. Supp. 1031 (D. Kan. 1982). This resulted in a reduction of railroad taxes for 1980 of 58%. On July 21, 1982, Kansas appealed the *Lennen* decision to the Tenth Circuit. That appeal is now pending.

Before the district court issued its final order in the 1980 case, the railroads filed similar cases for the 1981 tax year.[15] By agreement, these cases were stayed pending the resolution of the appeal in the 1980 case. The values which the state had assigned to the railroads' property for

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[14] Under Kansas law, all real property subject to ad valorem taxation is required to be valued at its fair market value in money. K.S.A. § 79-501. Kansas law further requires that all property subject to general property taxation be appraised uniformly and equally and assessed at 30% of fair market value. K.S.A. § 79-503.

[15] *See Atchison, Topeka & Santa Fe Ry.* v. *Lennen*, No. 81-1495.

the 1981 tax year were not significantly higher than the 1980 values. Therefore, in their 1981 cases, the railroads complained only of the underassessment of commercial and industrial property.

d. Nature Of The Present Litigation.

Following the 1980 and 1981 cases (in which the railroads obtained substantial equalization relief), Kansas officials substantially increased their estimate of the 1982 true market values of each of the petitioning railroads as follows:

Railroad	1981 System Valuation	1982 System Valuation	Percentage Increase
Burlington Northern Railroad Company	1,750,000,000	2,300,000,000	31.4%
Missouri Pacific Railroad Company	1,275,000,000	1,550,000,000	21.56%
The Kansas City Southern Railway Company	130,000,000	175,000,000	34.6%
Union Pacific Railroad Company	1,750,000,000	2,300,000,000	31.4%
Missouri-Kansas-Texas Railroad Company	100,000,000	160,000,000	60.0%

Statistical evidence also showed that commercial and industrial property in Kansas had been assessed for the 1982 tax year at a ratio of assessed value to the market value of only 11.7%.

On July 9, 1982, the railroads filed this action in the United States District Court for the District of Kansas alleging a violation of Section 306(1)(a) and seeking a preliminary and permanent injunction against the levy or collection by respondents of the excessive portion of the

first-half of the railroads' 1982 ad valorem taxes. Jurisdiction of the district court was predicated upon Section 306(2). The railroads' complaint alleged that the respondents had: (1) valued railroad property for purposes of ad valorem taxation in excess of true market value, and (2) had failed to equalize the railroads' assessments with those of locally-assessed commercial and industrial property.

At the hearing on the preliminary injunction, the railroads introduced evidence which showed:

a. Locally-assessed commercial and industrial property in Kansas was assessed at a median ratio of only 11.7% of true market value, rather than 30%;

b. In valuing the railroads' property for the 1982 tax year, the defendants had increased the railroads' valuations from the 1981 tax year by amounts ranging from 21.56% (in the case of Missouri Pacific Railroad Company) to 60% (in the case of Missouri-Kansas-Texas Railroad Company);

c. By the admission of the state's own appraisers, the increases in the railroads' values from 1981 to 1982 were not justified by any corresponding increases in the indicators of value used for railroad appraisal purposes;

d. The values which the state's appraisers assigned to the railroads' property for the 1982 tax year exceeded true market value by amounts ranging from 10% (in the case of the Missouri-Kansas-Texas Railroad Company) to 90.8% (in the case of the Union Pacific Railroad Company); and

e. As a result of the overvaluation of the railroads' property, the ratios of assessed value to true market value of rail transportation property in Kansas for the 1982 tax year ranged from 33% (in the case of the Missouri-Kansas-Texas Railroad Company) to 57.02% (in the case of the Union Pacific Railroad Company), higher in each case than the median ratio of 11.7% for commercial and industrial property.

By order dated December 1, 1982, the district court granted a preliminary injunction enjoining the assessment of railroad property at a ratio higher than 11.7%, and permitted the railroads to pay only 39% of their 1982 first-half taxes pending final disposition of the case. (Appendix C, p. 32a). However, the district court declined to grant the railroads preliminary injunctive relief on their claims of discrimination resulting from overvaluation of their property, holding that it had no jurisdiction to hear issues of railroad valuation, except where it appeared that a state had artificially raised valuations in order to retaliate against railroads who had previously obtained equalization relief under Section 306. (Appendix B, p. 24a). The district court supplemented its order of December 1, 1982, with an opinion dated December 9, 1982. (Appendix B).

On December 8, 1982, the railroads appealed the district court's refusal to grant a preliminary injunction on their claims of discrimination resulting from overvaluation of their property. On December 17, 1982, the railroads obtained from the Tenth Circuit a temporary injunction prohibiting the collection of the railroads' 1982 first-half taxes based upon excessive values.[16]

Before the Tenth Circuit, the railroads argued that: (1) the plain language of Section 306(1)(a) *requires* federal courts to determine the true market value of railroad property in order to compare the ratio of assessed value to true market value of railroad property with other property and to decide whether a violation of Section 306(1)(a) has occurred; and (2) the district court's refusal to hear railroad valuation issues, except in cases of "reliation," permits state officials to overvalue railroad proper-

[16] Appendix H p. 42a.

ty with impunity and to circumvent the provisions of Section 306(1)(a).

The Tenth Circuit rejected the district court's conclusion that Section 306(1)(d) requires a showing of "retaliation" as a prerequisite to hearing valuation issues. However, the Tenth Circuit held that federal courts have jurisdiction to determine valuation issues under Section 306 only where a railroad can make "a strong showing of a purposeful overvaluation of a particular railroad's property with discriminatory intent, whether or not the overvaluation was made in retaliation for other litigation." (Appendix A, p. 6a). Although the Tenth Circuit acknowledged that discriminatory assessments can result from overvaluation of railroad property as well as from underassessment of other property,[17] the court ruled that Section 306 was not intended to prohibit all forms of *de facto* property tax discrimination against rail transportation property and that Congress, in enacting Section 306, was concerned primarily with equalization-not valuation. (Appendix A, p. 4a).

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[17] An "assessment" is the product of a valuation and an assessment percentage. A discriminatory assessment can be achieved by overvaluing rail transportation property, as well as by undervaluing other commercial and industrial property. For example, if the results of a sales assessment ratio study established that the median assessment ratio for locally-assessed commercial and industrial property in a state was no greater than 60/100 or 60%, Section 306 would prohibit the assessment of rail transportation property at more than 60% of its true market value. If the true market value of a particular railroad was $100,000, the maximum permissible assessment under Section 306(1)(a) would be $60,000. If the state attempted to assess that railroad at $80,000, it would plainly be in violation of Section 306(1)(a). However, a state could achieve the same discriminatory result (i.e., an assessment of $80,000) by "valuing" the railroad at $135,000 and assessing it at 60% (i.e., .60 x $135,00 = $81,000).

The Tenth Circuit stayed its mandate and kept its injunction in force pending the filing of this petition for certiorari by the railroads. (Appendix E, p. 36a).

REASONS FOR GRANTING THE WRIT

This Case Is Of Overriding Importance. The Tenth Circuit's Decision Is An Open Invitation To The States To Discriminate Against Rail Transportation Property And To Negate Congress' Objectives In Enacting Section 306 By The Simple Expedient Of Valuing Rail Transportation Property In Excess Of True Market Value.

Congress obviously considered discriminatory state taxation of rail transportation property to be a problem of national concern. As shown by the legislative history of Section 306, Congress determined that state tax discrimination against rail transportation property was pervasive and imposed unacceptable burdens on interstate commerce.[18] Congress concluded that, in order to strengthen and facilitate interstate commerce, it must prohibit state tax discrimination against rail transportation property and provide a federal forum for the efficient and impartial litigation of tax discrimination claims.[19] Section 306 is, therefore, important remedial legislation.

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[18] *See* Report by the Committee on Interstate and Foreign Commerce Together with Additional and Minority Views, H. Rep. No. 93-1381, 93d Cong., 2d Sess. (1974); Discriminatory State Taxation of Interstate Carriers, Report of the Senate Committee on Commerce, S. Rep. No. 92-1085, 92nd Cong., 2d Sess. (1972); Discriminatory State Taxation of Interstate Carriers, S. Rep. No. 91-630, 91st Cong., 1st Sess. (1969); Discriminatory State Taxation of Interstate Carriers, S. Rep. No. 1483, 90th Cong., 2d Sess. (1968).

[19] *Ibid;* S. Rep. No. 94-499, 94th Cong., 2d Sess. (1976).

Since the effective date of Section 306, approximately thirty cases have been maintained in various federal courts challenging discriminatory assessments of rail transportation property.[20] Virtually all of these cases involve state tax discrimination resulting from the underassessment of commercial and industrial property. Almost without exception, the courts which have heard these cases have given effect to the remedial purposes of Section 306. Courts of appeal—other than the Tenth Circuit—have held expressly that Section 306 was in-

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[20] *Southern Railway Co.* v. *State Board of Equalization*, 715 F.2d 522 (11th Cir. 1983); *Clinchfield Railroad Co.* v. *Lynch*, 700 F.2d 126 (4th Cir. 1984), *affirming*, 527 F. Supp. 784 (E.D. N.C. 1981); *Trailer Train Co.* v. *State Board of Equalization of the State of California*, 697 F.2d 860 (9th Cir. 1983), *affirming in part*, 511 F. Supp. 553 (N.D. Cal. 1981); *Trailer Train Co.* v. *The State Board of Equalization of North Dakota*, 710 F.2d 468 (8th Cir. 1983); *General American Transportation Corp.* v. *Louisiana Tax Commission*, 680 F.2d 400 (5th Cir. 1982), *affirming*, 511 F. Supp. 610 (M.D. La. 1981); *State of Tennessee* v. *Louisville & Nashville R.R. Co.*, 478 F. Supp. 199 (M.D. Tenn. 1979), *aff'd without opinion*, 652 F.2d 59 (6th Cir. 1981), *cert. denied*, 454 U.S. 834 (1981); *Ogilvie* v. *State Board of Equalization of the State of North Dakota*, 492 F. Supp. 446 (D.N.D. 1980), *aff'd*, 657 F.2d 204 (8th Cir. 1981), *cert. denied*, 454 U.S. 1086 (1981); *State of Arizona* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 656 F.2d 398 (9th Cir. 1981); *Atchison, Topeka & Santa Fe Ry. Co.* v. *Lennen*, 640 F.2d 255 (10th Cir.), *on remand*, 531 F. Supp. 220 (D. Kan. 1981); *Atchison, Topeka and Santa Fe Ry. Co.* v. *The State of Arizona*, 559 F. Supp. 1237 (D. Ariz. 1983); *Atchison, Topeka & Santa Fe Ry. Co.* v. *Lennen*, 552 F. Supp. 1031 (D. Kan. 1982); *Louisville & Nashville R.R. Co.* v. *Louisiana Tax Commission*, 498 F. Supp. 418 (M.D. La. 1980); *Louisville & Nashville R.R. Co.* v. *Dept. of Revenue of the State of Florida*, Case No. 81-771 (N.D. Fla., filed 6/28/83) (Order Granting Plaintiffs' Motion for Summary Judgment); *Burlington Northern R.R. Co.* v. *Bair*, Civil No. 83-100-A (D. Iowa, filed 4/4/83) (Memorandum Opinion and Order Supplementing 3/30/83 oral preliminary injunction); *Burlington Northern R.R. Co.*

tended by Congress to prohibit discrimination against rail transportation property in all of its guises.[n]

As a direct result of Section 306, railroads have successfully challenged discriminatory taxes in Alabama, Arkansas, Arizona, California, Florida, Indiana, North Carolina, North Dakota, Montana, Kansas, and Tennessee. Federal preliminary injunctions have issued under Section 306 against discriminatory taxation in Colorado, Georgia, Iowa, Oklahoma, Utah, West Virginia, and Wyoming. Such relief has been obtained and maintained in large part because of the perception by the federal courts that, in enacting Section 306, Congress intended to prevent the states from imposing discriminatory taxes upon railroads in any form whatsoever. Thus, prior to the decision in this case, Section 306 has been used effectively as a tool for eliminating state tax discrimination against railroads.

The Tenth Circuit's decision holds expressly that Section 306 was *not* intended to prohibit all forms of state tax discrimination against rail transportation property. (Appendix A, p. 4a). Its decision leaves the states free to value rail transportation property well in excess of true market value unless plaintiffs can prove that such overvaluation was intentional.

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v. *Lennen*, Case Nos. 82-1562, 82-1561 (D. Kan., filed 12/1/82) (Order granting preliminary injunction in Case No. 82-1562 and Order granting, in part, preliminary injunction in Case No. 82-1561); *Burlington Northern, Inc.* v. *The Department of Revenue of the State of Montana*, CV-80-139-BLG (D. Mont., filed 7/26/83) (Findings of Fact and Conclusions of Law).

[n] *Southern Railway Co.* v. *State Board of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983); *Alabama Great Southern R.R.* v. *Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981); *Ogilvie* v. *State Board of Equalization*, 657 F.2d 204, 210 (8th Cir. 1981).

On its face, Section 306(1)(a) is concerned, not with the *intent* of state officials, but with the *consequences* of state action, i.e., is the ratio of assessed value to true market value of transportation property greater than the ratio of assessed value to true market value of all other commercial and industrial property? If so, Section 306(1)(a) has been violated. The Tenth Circuit has imposed a requirement of intent where none exists under the statute; its decision requires federal courts in Section 306 cases, not only to make the objective comparisons of assessment ratios that Section 306(1)(a) contemplates, but to examine and evaluate the motives of state officials. The Tenth Circuit has, in effect, altered the character of a simple federal statute which, by its terms, requires nothing more than a mathematical equivalence between two ratios.

Obviously, if a state can overvalue railroad property with relative impunity, it can continue to tax railroads in violation of the Act at ratios of assessed value to true market value higher than those applicable to other commercial and industrial property. Thus, the continued utility of Section 306 as a means of preventing state tax discrimination of railroad property is at issue here.

The question presented by this petition for review is, therefore, essentially the same as that presented in a different context by the petitioners in *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971). In *Griggs*, this Court granted certiorari in order to resolve the important question of whether the Fourth Circuit had correctly held that a claimant seeking redress under Title VII of the Civil Rights Act of 1964 must demonstrate discriminatory intent. Although Section 306 is addressed to a much narrower problem than Title VII, i.e., discriminatory state taxation of rail transportation property as opposed

to discriminatory employment practices affecting a broad class of citizens, Section 306 is nonetheless important remedial legislation intended by Congress to proscribe conduct which adversely affects the nation's economy.

The railroads respectfully submit that certiorari should issue in order to correct the Tenth Circuit's clear error, to remedy the confusion resulting from the introduction of intent as an element under this statute, and to effectuate Congress' clearly-enunciated policy of eliminating discriminatory state taxation of railroads.[22]

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[22] Petitioners are mindful that this was an appeal pursuant to 28 U.S.C. § 1292(a)(1) from the denial of a preliminary injunction. However, such cases may be reviewed despite their interlocutory status if there is some clear-cut issue of law that is fundamental to the further conduct of the case, particularly where an important jurisdictional question is raised by the decision. See *Land* v. *Dollar*, 330 U.S. 731 (1947); *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1948). This case meets these criteria. It presents a clear cut issue of law which is fundamental, not only to the further conduct of this case, but to federal cases that are pending in other jurisdictions, e.g., California, Colorado, Iowa, Oklahoma and Utah.

CONCLUSION

The railroads respectfully urge that a decision of such national importance, one which has grave and far-reaching consequences for the financial health of the railroad industry, should be reviewed by this Court and that the petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals,
Tenth Circuit.
Aug. 25, 1983.

No. 82-2534

BURLINGTON NORTHERN RAILROAD COMPANY; Missouri Pacific Railroad Company; The Kansas City Southern Railway Company; The Kansas and Missouri Railway and Terminal Company; Union Pacific Railroad Company; St. Joseph and Grand Island Railroad Company, a subsidiary of Union Pacific Railroad Company; and Missouri-Kansas-Texas Railroad Company,

Plaintiffs-Appellants,

v.

C. MICHAEL LENNEN, Secretary of Revenue of the Department of Revenue of the State of Kansas; Philip W. Martin, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas; and The Department of Revenue of the State of Kansas, an administrative agency of the State of Kansas,

Defendants-Appellees,

Bourbon, Decatur, Elk, Franklin, Gove, Lane, Linn, Marshall, Miami, Norton, Phillips and Pratt Counties, Kansas,

Intervenors.

Everett B. Gibson, Memphis, Tenn. (James W. McBride and Marion F. White, of Laughlin, Halle, Clark, Gibson & McBride, Memphis, Tenn., F. Kent Kalb, Senior Tax Counsel, Union Pacific Railroad Co., Broomfield, Colo., Chester A. Arterburn, Jr. of Sabatini, Waggener, Vincent & Arterburn, Topeka, Kan., and Robert C. Foulston of Foulston, Siefkin, Powers & Eberhardt, Wichita, Kan., with him on brief), for plaintiffs-appellants.

Carol B. Bonebrake, Kansas Dept. of Revenue, Topeka, Kan. (James J. McGannon of Regan & McGannon, Wichita, Kan., with her on brief), for defendants-appellees.

Robert J. O'Connor of Hershberger, Patterson, Jones & Roth, Wichita, Kan. (Donald J. Horttor and Grant M. Glenn of Cosgrove, Webb & Oman, Topeka, Kan., with him on brief), for intervenors Bourbon, Decatur, Elk, Franklin, Gove, Lane, Linn, Marshall, Miami, Norton, Phillips, and Pratt Counties, Kan.

Robert C. Foulston and Jay F. Fowler of Foulston, Siefkin, Powers & Eberhardt, Wichita, Kan., filed a brief for the Atchison, Topeka & Santa Fe R. Co., Chicago & North Western Transp. Co., Chicago, Rock Island & Pacific R. Co., William M. Gibbons, Trustee, Kansas City Terminal R. Co., and St. Louis Southwestern R. Co., as amici curiae.

Before McKAY, LOGAN and SEYMOUR, Circuit Judges.

LOGAN, Circuit Judge.

This is an appeal from an order of the district court denying a preliminary injunction sought by the railroad plaintiffs under 49 U.S.C. § 11503 (§ 306).[1]

The railroads sought to prevent the Kansas taxing authorities from collecting 1982 ad valorem taxes, which the railroads asserted were levied against them in violation of § 306. The railroads contended that they were entitled to equalization relief because commercial and industrial property in Kansas was assessed at a median ratio of 11.7% of true market value, while rail transportation property was assessed at no less than 30% of true market value. The trial court granted relief on the

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[1] Enacted originally as § 306 of Pub.L. No. 94-210, 90 Stat. 31, 54 (1976), the section was codified in 1978 as part of the revised Interstate Commerce Act at 49 U.S.C. § 11503. There are some differences in the language between the original section and the codification. This Court, in *Atchison, Topeka & Santa Fe Railway* v. *Lennen*, 640 F.2d 255, 258 (10th Cir. 1981), held that the original § 306 language governs if there are significant differences. The section will be referred to hereafter as § 306, consistent with the treatment in the trial court and the parties' briefs.

equalization issue, allowing the railroads to pay only 39% of their 1982 taxes pending final disposition of the case, which is being held in abeyance pending this Court's resolution of equalization issues in similar cases involving prior tax years. The equalization issue is not involved in the instant appeal.

The railroads also contended that they were entitled to valuation relief because their properties were valued for ad valorem tax purposes at more than true fair market value. The court declined to grant the railroads injunctive relief on the valuation issue, holding that it had no jurisdiction to hear issues of railroad property valuation except when it appears that the state has artifically raised valuations to retaliate against railroads that have obtained equalization relief. The issue in this appeal is the correctness of the trial court's determination.

This Court issued an injunction against collection of the taxes until we could hear argument and deliberate. We ordered the appeal accelerated, heard argument, and now determine the merits of the appeal.

Section 306 provides that a state is engaging in unlawful tax discrimination if it assesses

> transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

§ 306(1)(a), 90 Stat. at 54.

The parties agree that Congress intended to equalize assessment ratios between railroad and other commercial and industrial properties, although differences between them on what properties are compared and other applications of the act in Kansas are before us in other appeals. The parties disagree on whether the act gives the federal district courts jurisdiction to probe into the assessment process itself to determine whether the state taxing authorities have indeed arrived at the

"true market value" of the railroads' property. The railroads offer arguments based upon statutory construction and legislative history that Congress intended the district courts to evaluate the valuation methods and conclusions of state taxing authorities when considering claims of discriminatory taxation. They say that the statute requires comparison of assessments based upon the true market values of different classes of property and that a court cannot possibly determine whether relief is appropriate without being sure that apples are being compared to apples—that is, that the true market value of the railroad property is being compared to the true market value of other commercial and industrial property.

While the railroads' interpretation is a plausible one, we do not think that it is the proper interpretation. Section 306 was enacted to prevent both de jure and de facto discrimination against railroads in the collection of ad valorem taxes. One method of discrimination, prohibited by § 306(1)(c), is expressly imposing a different tax rate on rail property than is imposed on other commercial property. This is de jure discrimination. The most common form of de facto discrimination is imposing the same percentage rate of tax on both classes of property, but applying that rate to a value less than the true market value of other commercial and industrial property while applying it to the full true market value of rail property. The railroads ask us to apply § 306 to another potential form of discrimination, also de facto: taxing both classes of property at the same rate, but assessing rail property at a value higher than its true market value. Relief from this form is what the trial court referred to as valuation relief. *Ogilvie* v. *State Board of Equalization*, 657 F.2d 204, 210 (8th Cir.), *cert. denied*, 454 U.S. 1086, 102 S.Ct. 644, 70 L.Ed.2d 621 (1981), contains a broad statement that the purpose of § 306 was to prevent tax discrimination against railroads "in any form whatsoever." But we think it is by no means clear that § 306 was intended to provide relief from every form of de facto discrimination. We believe that important considerations support the trial court's conclusion that the valuation relief sought by the railroads is not provided by § 306.

The language of § 306 does not provide explicit guidance on the range of potential de facto discrimination district courts have the power to remedy. We note, however, that the statute sets forth a specific method of proof of the market value of commercial and industrial property, *see* § 306(2)(e), but contains no discussion of a proper method for valuing rail property. While this absence of specific direction is not dispositive, its significance is underscored by the facts in this case. The railroads' expert would value the rail property in question by essentially the same method—unitary valuation—the state of Kansas employs. It is within the context of this method that the expert disagrees with some of the state's calculations of various factors. While Congress specifically addressed the valuation of commercial property, it did not address the complex problems associated with the valuation of rail property.

The absence of specific statutory direction makes an examination of the legisative history of § 306 appropriate. Such an examination militates against the railroads' position. The district court properly included in the scope of its review of the legislative history predecessors to the bill that ultimately became § 306. *See Arizona* v. *Atchison, Topeka & Santa Fe Railroad*, 656 F.2d 398, 404 n. 6 (9th Cir.1981). We have examined every item of legislative history cited by the district court and every item cited to us by the parties. We think that the district court's opinion fairly recited the pertinent legislative history, which we will not repeat, and that the district court's conclusion was correct. Despite Congress' extensive consideration over a number of years of the problems of tax discrimination, no report or hearing specifically addresses the problems or benefits of involving the district courts in the intricacies of the process of arriving at the valuation of rail property. The history suggests that equalizaton, not valuation, relief was intended to be made available to the railroads. *See* S.Rep. No. 585, 94th Cong., 1st Sess. 139 (1975); S.Rep. No. 1483, 90th Cong., 2d Sess. 22, 23 (1968).

Finally, we consider that § 306 was passed as an express exception to the general proscription on federal interference

with state taxation contained in the Tax Anti-Injunction Act, 28 U.S.C. § 1341. Section 306 obviated the need for the railroads to meet § 1341's required showing that a plain, speedy, and efficient remedy is not available in the courts of the state before the district court can act. There is no express indication in § 306 or in the legislative history that Congress intended the railroads to escape the general noninterference rule of § 1341 to the extent that they could challenge the manner in which state assessment officials arrived at the fair market value of their property in federal court on a yearly basis. Such a rule would impose significant burdens on district courts and would substantially thwart the tax collection process of states and their subdivisions. Absent a specific director from Congress, we are unwilling to infer that it intended district courts to sit as state tax assessment boards for railroad property.

The district court declared that it would grant relief under § 306 if the railroad could make a strong showing that state authorities deliberately overvalued the railroads' property in retaliation for past equalization relief the railroads had secured. We agree, but we would hold that a suit can be maintained whenever a railroad can make a strong showing of a purposeful overvaluation of a particular railroad's property with discriminatory intent, whether or not the overvaluation was made in retaliation for other litigation. We emphasize, however, that a strong prima facie case of retaliation or intentional discrimination must be made. Here, there were substantial increases in the property valuations for most of the railroads involved in this appeal between the 1981 and 1982 tax years. The trial court found, however, that the procedures the state used to arrive at the 1982 unit valuations were identical to those it used over a long prior period and identical to those used to value the properties of the other railroads in Kansas in 1982. We have examined the record and are satisfied that the railroads did not make a sufficient showing of discriminatory overvaluation.

We therefore affirm the district court's denial of injunctive relief. Because we stayed the payment of the portion of the

taxes at issue here pending decision of this appeal, no penalty shall be assessed against the railroads if they pay the taxes that they have withheld because of our grant of a temporary injunction within seven days after the issuance of the mandate in this case.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 82-1561

BURLINGTON NORTHERN RAILROAD COMPANY., *et al.*,
Plaintifffs,

VS.

C. MICHAEL LENNEN, *et al.*,
Defendants.

Case No. 82-1562

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY CO., *et al.*,
Plaintiffs,

VS.

C. MICHAEL LENNEN, *et al.*,
Defendants.

FILED
DEC -9 1982
ARTHUR C. JOHNSON, Clerk

By/s/ Mellanie Drake
MELLANIE DRAKE
Deputy

MEMORANDUM

On December 1, 1982, this court issued an abbreviated order deciding the pending motions for preliminary injunction filed by the plaintiff railroads in the above-mentioned cases. In that order, we promised that a more detailed memorandum on the

issues decided in the order would follow. This memorandum discusses those rulings.

BACKGROUND

In the instant cases, eleven interstate railroads seek relief under Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act), now codified at 49 U.S.C. § 11503. Section 306 prohibits discriminatory state taxation of railroads and provides that rail transportation property may not be assessed at a higher ratio of assessed value to true market value than the ratio of assessed value to true market value at which commercial and industrial property within the state is assessed. These cases were originally filed separately, each by a different group of plaintiff railroads. On September 21, 1982, we consolidated these cases for the purposes of discovery and trial pursuant to Rule 42(a) of the Federal Rules of Civil Procedure. In order to fully understand this court's order of December 1, 1982, and this memorandum, it is necessary to examine each of these cases. The plaintiffs in *Atchison, Topeka & Santa Fe Railway Co.* v. *Lennen*, No. 82-1562, consist of the following interstate railroads: Atchison, Topeka and Santa Fe Railway Company; Chicago and North Western Transportation Company; Chicago, Rock Island and Pacific Company[1]; Kansas City Terminal Railway Company; and St. Louis Southwestern Railway Company (hereinafter referred to collectively as the Santa Fe plaintiffs). The plaintiffs in *Burlington Northern Railroad Co.* v. *Lennen*, No. 82-1561, include these interstate railroads: Burlington Northern Railroad Company; Missouri Pacific Railroad Company; Kansas City Southern Railway Company; Kansas and Missouri Railway and Terminal Company; Union Pacific Railroad Company including the

[1] William G. Gibbons is also a named plaintiff in this case. He is the duly appointed and acting trustee of the property of the Chicago, Rock Island and Pacific Railroad Company by virtue of an order of the United States District Court for the Northern District of Illinois, Eastern Division, entered on March 28, 1975, in Case No. 75 B 2697.

St. Joseph and Grand Island Railway Company; and Missouri-Kansas-Texas Railroad Company (hereinafter referred to collectively as the Burlington Northern plaintiffs). The defendants in each case are identical. Named as defendants are: C. Michael Lennen, Secretary of Revenue of the Department of Revenue of the State of Kansas; Phillip W. Martin, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas; and the Department of Revenue of the State of Kansas, an administrative agency of the State. In both cases, the court has allowed certain county officials to intervene.

The claims made by the Santa Fe plaintiffs are identical to those made in previous actions brought under Section 306 of the 4-R Act in this court in 1980 and 1981 by the railroads operating in Kansas.[2] These railroads seek equalization relief

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[2] In 1980, five different actions were filed by the railroads operating in Kansas seeking relief from discriminatory assessments of property taxes on rail transportation property within the State of Kansas under Section 306. These cases were consolidated by this court and are referred to as *Atchison, Topeka & Santa Fe Railway Co.* v. *Lennen*, Nos. 80-4172, 80-4173, 80-4176, 80-4181, 80-1690 (hereinafter referred to as the "1980 tax case"). On April 15, 1982, this court, after a lengthy trial, entered its final order in the 1980 tax case. In that order, the court determined that the provisions of Section 306 had been violated and enjoined the defendants and their agents from assessing and taxing plaintiffs' rail transportation property for the 1980 tax year at a ratio of assessed value to true market value higher than 12.2 percent, which we later amended to 12.4 percent. This decision is currently on appeal.

In 1981, all of the railroads operating in Kansas again filed suit in this court seeking relief under Section 306. This case, *Burlington Northern Railroad Co.* v. *Lennen*, No. 81-1595 (hereinafter referred to as the "1981 tax case"), remains pending in this court. We have entered two preliminary injunctions in the case in favor of the railroads but a trial of the case has not yet occurred. It is anticipated that this case will not proceed any further until a decision is reached by the Tenth Circuit Court of Appeals on the 1980 tax case.

under Section 306. They contend that the defendants have assessed their property in 1982 at a higher ratio of assessed value to true market value than other commercial and industrial property within the State of Kansas. The Santa Fe plaintiffs seek an order prohibiting the defendants from assessing or taking any action to collect 1982 taxes based on assessments that exceed those permissible under law. Presently, these railroads seek a preliminary injunction preventing the defendants and their agents from collecting that portion of their first half 1982 taxes[3] based on assessments that exceed those permissible under Section 306.

The claims made by the Burlington Northern plaintiffs are slightly different. Like the Santa Fe plaintiffs, they seek equalization relief. However, in addition to equalization relief, they seek valuation relief. They contend that the defendants substantially overvalued their property in 1982. This case marks the first time in a Section 306 case before this court that the railroads have contended that the defendants overvalued their rail transportation property. In the past, the railroads have accepted, for the purposes of their Section 306 cases, the defendants' unit valuations of their property. At the present time, these railroads seek a preliminary injunction preventing the defendants and their agents from collecting that portion of their first half 1982 taxes based on assessments and valuations that exceed those permissible under Section 306.[4]

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[3] Under Kansas law, property taxes are paid in two installments. The first half of a taxpayer's property tax is due on December 20. The second half of the tax is due on June 20. K.S.A. 79-2004.

[4] At the hearing on the plaintiffs' motions for preliminary injunction, counsel for the Burlington Northern plaintiffs informed the court that plaintiff Kansas and Missouri Railway and Terminal Company did not wish to be included with the other railroads seeking a preliminary injunction in the valuation issue. Thus, for the purposes of the preliminary injunction, they seek only equalization relief.

On November 23, 1982, this court began hearing evidence on the plaintiffs' motion for preliminary injunction filed in each case. This evidence was eventually concluded on November 29 and we issued the order which preceded this memorandum on December 1, 1982. As we did in our earlier order, we will divide up our discussion in this memorandum in terms of the plaintiffs' request for equalization relief and the plaintiffs' request for valuation relief.

EQUALIZATION RELIEF

The parties have stipulated that the court may consider this evidence presented in the 1981 tax case on the issue of equalization relief for the purposes of determining that issue in these cases. The parties have so agreed because no new additional evidence exists at this time due to the fact that the 1982 Kansas sales assessment ratio study is not yet available. In the 1981 tax case, the plaintiff railroads submitted a sales assessment ratio study prepared by Dr. Frederick Ekeblad that was based upon information from the 1981 Kansas sales assessment ratio study. This study showed that commercial and industrial property in Kansas was assessed at approximately 11.7 percent of true market value. The defendants submitted evidence which demonstrated another method of calculating the assessment ratio of commercial and industrial property in Kansas. It was recognized by the defendants' expert witness, Dr. Darwin Daicoff, during the hearing in the 1981 tax case, that the methodology suggested by the defendants was not in accordance with this court's rulings in the 1980 tax case. Finding the plaintiffs' evidence in accordance with our decision in the 1980 tax case, we found that the plaintiffs had demonstrated reasonable cause to believe that a violation of Section 306 had occurred. Based upon that same evidence, the court makes the same finding in this case. The court will sustain the plaintiffs' motions for preliminary injunction on their request for equalization relief.

VALUATION RELIEF

As aforementioned, the Burlington Northern plaintiffs contend that the defendants overvalued their property in 1982. They contend that the procedures used by the Division of Property of Valuation (hereinafter referred to as "DPV") to value railroads in the State of Kansas are irrational and result in excessive overvaluation. They further assert that they were overvalued in 1982 in retaliation for relief they were awarded by this court in the 1980 tax case. These railroads suggest that the court lower their 1982 unit valuations to their 1981 unit valuations. The defendants have strenously objected to the court examining the "true market value" of each of the Burlington Northern plaintiffs.

The plaintiff railroads argue that the plain language of Section 306 requires the court to first make a determination of the true market value of a railroad system's property before conducting the equalization of railroad property taxes with all other commercial and industrial property taxes. Moreover, they contend that this court has already determined, in the 1980 tax case, that the issue of valuation of the railroads is an appropriate one in a Section 306 case. Further, the railroads assert that the defendants are now taking a contrary position on this issue to the one they asserted in the 1980 tax case. They contend that the defendants, in that case, argued that the question of the "true market value" of the railroads was indeed an issue in a Section 306 action.

It is the defendants' position that the court has no jurisdiction under Section 306 to consider the unit valuations of the plaintiff railroads. Essentially, they contend that the valuations determined by them are the valuations against which this court must apply the standards of Secton 306. The defendants assert that the legislative history of Section 306 demonstrates that Congress did not intend to extend Section 306 to valuation questions. Further, they submit that the railroads, in urging the court to redetermine their valuations, are requesting that the court ignore the prohibition against the federal courts assessing or levying taxes established in *Moses Lake Homes*,

Inc. v. *Grant County*, 365 U.S. 744 (1961). Finally, the defendants suggest that the plaintiff railroads have "grossly" misconstrued the position they took on valuation in the 1980 tax case.

The court did consider, at least to a certain extent, the issue of valuation in the 1980 tax case. At that time, however, the issue was raised in a slightly different context. The defendants and the country intervenors had, from the outset of the 1980 tax case, contended that the court could not compare the unit valuation method of appriasal used on railroads with the segregated valuation appriasal approach used on other commercial and industrial property in Kansas. In this regard, they argued that it was necessary for the court to determine the true market value of each railroad under a segregated approach in order to be able to compare it with other commercial and industrial property in the State of Kansas under the provisions of Section 306. The defendants admitted that they had properly valued the plaintiff railroads under the unitary method but asserted that the segregated approach would achieve a different value. In a motion in limine filed prior to the trial of the 1980 tax case, the railroads sought an order prohibiting the introduction of evidence on their value because valuation was not an issue in the case. After a review of the legislative history on the particular point presented, we declined to hold as a matter of law that the defendants could not present evidence based on their arguments regarding valuation. This court must note that this ruling was made in part in an effort to hear as much evidence as possible in this relatively new area of law. After hearing all of the evidence in the case, we concluded that the Director of the DPV had properly valued the plaintiffs' property under the unitary method of appriasal and accurately arrived at the true market value of the plaintiffs' property for the 1980 tax year. Considering the context in which the issue was raised in the 1980 tax case, we do not consider our earlier ruling determinative of the issue presented herein. We now move to a thorough and detailed discussion of the issue of valuation in an action brought under Section 306.

Section 306 provides that a state is engaging in unlawful discrimination if it assesses:

> transporation property at a value which bears a higher ratio to the *true market value* of such transportation property then the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the *true market value* of all such other commercial and industrial property. (Emphasis added.)

The issues of "true market value" and valuation of rail transportation property were raised and discussed in the reports and during the hearings that proceeded the passage of Section 306 of the 4-R Act.[5] It appears that Congress first discussed the concern of true market value in 1968 when it was considering S. 927, one of the several precursors to Section 306. In a report on that bill, the Senate Committee on Commerce stated:

> In order to avoid any question as to the meaning of the phrase "true market value" as used in S. 927, the committee accepts the definition of this phrase as set forth in appendix B attached to this report. The committee intends by the phrase "true market value" the meaning set forth in appendix B.

S.Rep. No. 1483, 90th Cong., 2nd Sess., p. 10 (1968).

Appendix B to S.Rep. No. 1483 stated as follows:

> True market value is the goal generally sought by all tax assessors either as the assessment figure or as a starting point from which final assessments of less than true market value may be computed. In an authoritative treatise

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[5] Before passing Section 306, Congress had considered proposals virtually identical to it since 1961. It is well-established that legislative proposals which were not enacted, but which antedate statutory provisions under consideration by a court, are relevant and material to a complete understanding of the statute. *United States* v. *Enmons*, 410 U.S. 396; 404 n.14 (1973); *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board*, 336 U.S. 601, 605-06 n.6 (1948); *State of Arizona* v. *Atchison, Topeka & Santa Fe Railroad Co.*, 656 F.2d 398, 404 n.6 (9th Cir. 1981).

published by the National Association of Tax Administrators, the following statement appears:

"The statutes of the several States prescribing the value standard for tax purposes use such terms as 'fair market value,' 'fair cash value,' 'full market value,' and the like. All of these terms are synonymous; they mean nothing more and nothing less than what we mean in this report by the term 'market value' or the work 'value' without a qualifying adjective."

These have been judicially defined in numerous cases. *New York Bay R. Co.* v. *Kelly*, 22 N.J. Misc. 204, 37 A. 2d 624, 628 (1944); *Fort Worth & D.N. Ry. Co.* v. *Sugg* (Tex. Civ. App.), 68 S.W. 2d 570, 572 (1934); and *Guyandotte Valley R. Co.* v. *Buskirk*, 57 W.Va. 417, 50 S.E. 521, 526 (1905).

The proportion of "true market value" at which assessments are finally fixed varies among the several States. In some States, the law requires assessment at true market value, in others at 60 percent thereof, in others at 35 percent, et cetera.

Railroad property in most of the States is valued and assessed as a unit; that is, the whole system as it exists in 8, 10, or 15 States is valued; this value is distributed among the several States on the basis of recognized allocation factors; and then, in turn, the value in a particular State is apportioned among the several taxing districts in that State on the basis of mileage. In other words, when railroads are assessed as a unit the total value is first determined and then apportioned; the total assessment is not determined by adding the assessed value of individual items that make up the railroad plant.

As to the few States in which railroad property is locally assessed there is no specific information concerning the assessment methods.

S. 927 does not suggest or require a State to change its assessment standards, assessment practices, or the assessments themselves. It merely provides a single standard against which all affected assessments must be measured in order to determine their relationship to each other. It is not a standard for determining value; it is a standard to which values that have already been deter-

> *mined must be compared. This standard is "true market value" (also the generally accepted standard for assessment purposes) and the requirement is that carrier property be assessed at the same proportion of such value as the proportion at which all other property subject to the same tax rates is assessed.* (Emphasis added.)

The language contained in Appendix B that S. 927 was not a standard for detemining value but was a standard for comparing values already determined had apparently been adopted from a statement given previously by James N. Ogden, Vice President and General Counsel of the Gulf Mobile and Ohio Railroad Company, during hearings before a Senate subcommittee on S. 927 on August 7 and 8, 1967. Speaking on behalf of the Association of American Railroads, Mr. Ogden had stated:

> . . . *S.927* does not suggest or require a State to change its assessment standards, assessment practices, or the assessments themselves. It merely provides a single standard against which all affected assessments must be measured in order to determine their relationship to each other. *It is not a standard for determining value; it is a standard to which values that have already been determined must be compared.* (Emphasis added.)

Hearings Before the Subcommittee on Surface Transportation of the Committee on Commerce on S. 927, 90th Cong., 1st Sess., p. 29 (1967).[6]

On July 30, 1969, hearings were conducted before the Senate Subcommittee on Surface Transportation of the Committee on Commerce on S. 2289, the successor to S. 927. During these hearings, the question of whether the federal courts would be empowered to reexamine the valuation of a railroad's property arose on two occasions. The issue was first raised during the following colloquy between Wyoming Senator Clifford P. Han-

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[6] Mr. Ogden had first made these comments on July 28, 1964, in a hearing before the House of Representatives' Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce on H.R. 736, 10169, forerunners of Section 306.

sen and Phillip M. Lanier, Vice President-Law, Louisville and Nashville Railroad Company, who at the time was speaking on behalf of the Association of American Railroads:

> Senator HANSEN. Is this same formula—this same three-factor formula in use for the purposes of this study throughout the country, or is this only the way it is done in Wyoming?
>
> Mr. LANIER. *The formula varies from State to State and we are not dealing with the valuation question. This is not our problem. We speak only of the equalization of the tax rate.* (Emphasis added.)

Hearings Before the Subcommittee on Surface Transportation of the Committee on Commerce on S. 2289, 91st Cong., 2nd Sess., p. 39 (1969).

The issue was again raised in a question by Senator Hansen to Broley E. Travis, a consulting valuation engineer:

> Senator HANSEN. Thank you very much, Mr. Travis. I'm sure the committee will be impressed with your observations.
>
> You have been in this business for a long time, and I think you have made a most commendable contribution toward a more complete understanding of the problem.
>
> Thank you, sir.
>
> I do have one question, Mr. Travis. It has been handed to me. An objection to this legislation which has come to my attention is the possibility that the bill would require the Federal courts to review and determine the correctness of not only valuation procedures and actual valuation results for the carriers, but also the entire work of each assessing agency with respect to all properties. This is so, it is alleged, because the bill contemplates the determination of values. This committee's report of last year considers this problem in appendix B, but for the record, I would like your views on the validity of this argument.
>
> Mr. TRAVIS. Well, I believe, it would be my impression, being an engineer, and not an attorney, *that the Federal court would have to review both the valuation as made by the administrative officers, and the equalization.*

Now, it is the duty of the complaining taxpayer to prove the valuation is too high, and it is his duty to prove what the assessment ratios are in the county or the State or whatever the division is that he is operating in, in which he is complaining of such matters.

So the burden of proof is upon the taxpayer to present such evidence to the court in order to guide the court in its judgment.

Senator HANSEN. Is it your understanding that this bill could very well contemplate and recognize the continuance of a situation wherein one State might value pieces of property and miles of track, say, at twice the amount at which another State might fix the value, and yet the action of neither State would be discriminatory if all of the other properties within the two respective States were assessed in a comparable fashion?

Mr. TRAVIS. *As a technician, to me, assessment has to start with valuation. That's where you start. And you find the market value of the property, whether you are assessing a house or a railroad.* That's the yardstock that is common to every place. (Emphasis added.)

Id. at p. 59.

In the report that followed on S. 2289, the Senate Committee on Commerce rejected the viewpoint of Mr. Travis and once again adopted the view that S. 2289, like S. 927, was not intended as a standard for determining value. See S.Rep. No. 91-630, 91st Cong., 1st Sess., pp. 10, 25-26 (1969). The issue of valuation was again raised in 1970 in a hearing before a House of Representatives' subcommittee on H.R. 16245. Philip M. Lanier told these members of Congress that the bill did not give the federal courts the right to redetermine valuation:

Mr. LANIER. *On the valuation—this bill would not deal with valuation being standard.The standards and methods of valuation that any State wishes to use would be totally unaffected by this legislation.*

The short answer, if I may give it this way, and I think it will be clear, is that for valuation purposes different kinds of property put to different uses do require different methods of valuation. And the method of valuation applied

to a railroad is quite different from that which is applied to a residence, a farm, factory, whatever it may be. And that is appropriate because it is the way to get at the real value. There is nothing in this legislation—and we have no brief here to alter that—it is only in the area of equalization of the computed value that this legislation speaks. That is where our problem is.

Mr. [Brock] ADAMS [Representative from the State of Washington]. On page 2 of the bill it says, "The assessment"—which is what the tax collector comes in on—"for purposes of a property tax"—and that is all I am talking about here now—"owned or used by a common carrier at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all other such property."

That appears to me that you are taking into account both valuation and assessment.

Mr. LANIER. I think I can answer it this way.

Without regard to this legislation, assuming it is enacted, without regard to it the assessing authority for the railroads puts a value—a fair market value, true market value, the words means the same—on that railroad property and the local assessor in the towns you refer to puts a true market value on the residences. *After that is done, this bill would come into play.*

Mr. ADAMS. But that help could not—if, for example, vacant property in that area with no buildings on it was assessed at, we will say, 100 by 100 lot, would be assessed at $5,000—with a building on it, of course, valuation is going up—so then if your railroad property was assessed at more than that, under this bill—this is what I am asking you—I think you pobably would have an automatic lawsuit that would say the value of a piece of real property with two rails on it and no other improvements should not be any higher than either vacant property plus the value of the rails.

Unless, of course, you are using this unitary system that you mentioned which would take into account a lot of

other factors, and since Mr. Smith is talking about real property and assessment and the bill, I am just asking you how it works.

Mr. LANIER. Let us assume that the vacant lot is assessed at $5,000, that is the fair market value of that lot. Now, in Washington the equalization ratio is 50 percent.

Mr. ADAMS. In Washington it is 50 percent. There is a fight going on because nobody is assessing at 50 percent. In some counties it is 20 and in others it is 32 and in others it is 56. I you have a lot of lumber in a particular county, a lot of trees, you get a low assessment rate—

Mr. LANIER. Let's take the 50 percent then, so that that vacant lot actally carriers a tax on $2,500. Now let us assume that a portion of the right-of-way of the railroad equivalent in the area in that town to the vacant lot carriers a value, fair market value determined by the State assessing authority of $20,000, if it is equalized at 59 percent, the tax goes against only $10,000. That is all this bill requires, and that is all we ask for.

Because we are speaking in terms of uniformity of the equalization ratio, not uniformity of the result in dollars of value or in dollars of tax, *but only that once the fair market value is determined, the equalization ratio will be the same*. And since you would have a 50 percent ratio in each instance, we would have absolutely no complaint and no grounds for complaint. (Emphasis added.)

Hearing Before the Subcommittee on Transportation anmd Aeronautics of the Committee on Interstate and Foreign Commerce on H.R. 16245, 91st Cong., 1st Sess., p. 138-39 (1970).

From the aforementioned legislative history of Section 306, several things are apparent. Congress on several occasions considered the issue of whether this legislation to make unlawful discriminatory taxation against rail transportation property would require the federal courts to reveiw and determine the correctness of the valuation procedures and the actual valuation results for the railroads by each state assessing agency. It appears clear the Congress did not intend to place this burden on the federal courts. Discriminatory valuation of the railroads, although mentioned on a few occasions during

the course of the passage of Section 306, was not the problem that Congress sought to remedy in the passage of Section 306. The purpose of the bill was to provide relief for the railroads from discriminatory taxes through improper assessments or rates. We simply do not believe that Congress intended for the federal courts to become involved in establishing new or better procedures for the states in the valuing of railroads. Section 306 simply provides a standard to which values that have already been determined must be compared. Accordingly, we believe that the issue of the appropirate "true market value" of a railroad is generally not to be an issue in a Section 306 case.

Other courts which have considered this issue have arrived at conclusions similar to that reached by this court. In *Louisville & Nashville Railroad Co.* v. *Louisiana Tax Comm.*, 498 F.Supp. 418 (M.D. La. 1980), the defendant argued that the unit method they utilized to value railroads produced a lower value than other appraisal methods utilized on commercial and industrial property. The court refused to hear evidence based on defendant's argument, stating:

> The Federal Statute [Section 306] is quite clear. It leaves the States the appraisal method or methods to be utilized in determining 'fair market value' or 'true market value.' It simply provides that after fair market value has been determined the States may not discriminate against rail transportation property and if the discrimination exceeds the 5% prohibition, then the District Courts may grant injunctive relief.

Id. at 421.

In *Burlington Northern Inc.* v. *Department of Revenue of the State of Montana*, No. CV-80-139-BLG (D. Mont., unpublished, 7/26/82), the issue of the valuation of rail transportation property was raised and thoroughly considered. In that case, the defendant had sought to show that it had valued the plaintiff railroads' property at less than true market value. The railroads had argued that the defendant should be stopped from discrediting valuations based upon the mandates of Montana taxation statutes and the defendant's own regulations.

However, in addition, the railroads had raised the valuation issue in anticipation of its use as an affirmative defense by the defendant. The court made the following findings:

> The Court further believes that the DOR should not be permitted to, in essence, revalue and reappraise the railroad property under the guise of seeking true market value for such property. The DOR must utilize and adopt the unit valuation of the railroads which it certified in 1980.
>
> * * * * *
>
> We find that valuation is not an issue which should be addressed in this case. Each party must accept the property valuations actually determined by the DOR.

The court then concluded:

> Section 306 affords each state broad discretion concerning methods of valuation and appraisal in property taxation. Thus, market value determinations are left to a state's discretion provided the result of the valuation process is not discriminatory against railroads. *State of Arizona* v. *Atchison, T. & S.F. R.*, 656 F.2d at 408 n. 9. *Louisville & Nashville Railroad Company* v. *Louisiana Tax Commission, supra.*
>
> * * * * *
>
> The DOR has previously determined the true market value of the railroad through the unit valuation method. It cannot not now search for a "new" or "more correct" market value in order to pass scrutiny under § 306. Section 306 gives the DOR options regarding how market value is determined. Once market value is found and the taxation scheme is then found to be discriminatory against the railroads, the Act does not allow the DOR to then seek a new method of valuation in an effort to fall within the 5% limits of § 306(c). Such post-comparison tactics are, at best, an illusory compliance wth § 306.

In sum, we believe that Congress did not intend the federal courts to become involved in the issue of valuation of the railroads. In light of this ruling, the court finds it unnecessary at this point in the opinion to consider the contentions raised by the defendants regarding the doctrine established in *Moses Lake Homes, Inc.* v. *Grant Country, supra.*

The court does wish to note what we believe to be an exception to the general rule that Congress did not intend the federal courts to get involved in valuation problems in Section 306 cases. We do believe that a court, under the equity power vested in the federal courts by Congress under Section 306, could examine the valuation established by a state where a railroad has shown that a state overvalued its property in retaliation for past relief accorded under Section 306. In passing Section 306, Congress provided the federal courts with significant equity power to remedy discriminatory taxation of rail transportation property. The court has examined in some detail this grant of equity power in the 1980 tax case. In that case, we found the grant of equity power under Section 306 insufficient to award retroactive relief to the railroads for alleged discriminatory taxation in 1979. We reached that decision based upon the language of Section 306 and the legislative purpose of the statute. We do not find the considerations noted in that case to be applicable here in considering whether a court may remedy, under its broad equity power, overvaluation in retaliation for past relief accorded under Section 306. Nor do we find the creation of this exception to contravene the *Moses Lake* decision. In that case, the Supreme Court held that a federal court may not make the adjustment necessary to make an invalid tax valid. The courts are limited to determining whether existing taxes are valid, and have no power to substitute a valid tax for the invalid tax. Here, the court is simply fashioning an equitable remdy to protect a substantive right which Congress has established. This right is the right of a railroad to be free of discriminatory assessment. The *Moses Lake* decision did not suggest that federal courts could not fashion measures to achieve this result. This court would only be protecting a right given under federal law and we do not find *Moses Lake* to prohibit this action.

Of course, the Burlington Northern plaintiffs do content that the defendants overvalued their property in 1982 in retaliation for relief they received in the 1980 tax case. To determine whether retaliation was present in the defendants' 1982 valua-

tions of these five railroads, it is necessary to consider the testimony and evidence that was presented by the parties. The court heard from three witnesses, the Director of the DPV, a member of the staff of the DPV, and the plaintiffs' expert witness.

Under Kansas law, the fair market value of the plaintiffs' rail transportation property is determined by the unitary method of appraisal, i.e., valued as a "going concern." Specifically, K.S.A. 79-5a04 provides, in pertinent part:

> The division of property valuation in determining the fair market value of public utility property shall, where practicable, determine the unit valuation, allocated to Kansas, and in doing so shall use generally accepted appraisal procedures developed through the appraisal process and may consider, including but not by way of exclusion, the following factors:
>
> (1) Original cost.
>
> (2) Original cost less depreciation or reproduction cost less depreciation, or both, or replacement cost new less depreciation, except that where either method is used proper allowance and deduction shall be made for functional or economic obsolescence and for operation of nonprofitable facilities which necessitate regulatory body approval to eliminate.
>
> (3) The market or actual value of all outstanding capital stock and debt.
>
> (4) The utility operating income, capitalized in the manner and at such rate or rates as shall be just and reasonable.
>
> (5) Such other information or evidence as to value as may be obtained that will enable the property valuation department to determine the fair market value of the property of such public utility.
>
> The fair market value of affiliated properties separately assessed, or the nonoperating properties of such companies, or both, shall be ascertained and determined as nearly as possible and deducted from the total unit value of the properties of such companies if such properties are included in the unit value. Except for the property of any

> entity enumerated in subsection (b) of K.S.A. 79-5a01, as amended, and insofar as it is practicable to do so, the same method of evaluating the properties of the companies separately assessed or nonoperating properties, or both, shall be used as was used in determining the unit value of such companies. All property of any entity enumerated in subsection (b) of K.S.A. 79-5a01, as amended, shall be valued by the county or district appraiser in the same manner as provided by law for the valuation of the same type or class of property in the county.

Charles Burkhart, supervisor of the utility bureau within the DPV, testified that the staff of the DPV, under his supervision, formulates the figures for the various factors articulated in K.S.A. 79-5a04. The staff arrives at the figure on each factor, commonly referred to as an "indicator of value," based essentially upon information received from each railroad. These indicators of value for each railroad, along with the DPV's indicators of value for each railroad for the two preceding years, are then sent to defendant Phillip Martin, the Director of the DPV. Defendant Martin examines the various indicators of value, correlates them, and then arrives at a final unit value for each railroad.

Dr. Arthur Schoenwald, a consultant in the area of valuing railroads, testifying on behalf of the railroads criticized the work of the DPV. As to each railroad, he found fault with the DPV's indicator of value figures and their ultimate correlated value. His criticisms centered primarily around the procedures utilized by the staff and the Director of the DPV to achieve their figures.

After carefully considering the evidence on overvaluation, we do not find that the plaintiffs have demonstrated reasonable cause to believe that the defendants retaliated against them for relief received in the 1980 tax case. We reach this conclusion based on several facts adduced during the evidence that was presented. The procedures used by the defendants to arrive at the 1982 unit valuations were identical to the procedures used by the defendants for over ten years to value railroads operating within the State of Kansas. Further, these procedures

were identical to those used to value the other railroads within the State of Kansas in 1982. It appears that the railroads have long been dissatisfied with the procedures used by the defendants to value railroad transportation property in Kansas. The procedures utilized in 1982 certainly were not just instituted in order to create a higher value for the railroads. The court found the explanations offered by defendant Martin for the increases in the 1982 valuations of the Burlington Northern plaintiffs to be credible. In sum, we find that the plaintiffs have failed to adequately demonstrate any retaliation by the defendants in their 1982 valuations of the Burlington Northern plaintiffs. Further, even if we were to consider simply the issue of overvaluation, we do not find that the plaintiffs demonstrated reasonable cause to believe that the defendants, under the standards provided under Kansas law, overvalued the plaintiffs' property in 1982. In sum, we refuse to grant any relief to the Burlington Northern plaintiffs based on alleged overvaluation.

Our decision, however, does not mean that the railroads are without a remedy to correct overvaluation of their property by the defendants. The railroads have several avenues available to them under Kansas law to challenge overvaluation by the defendants.

The railroads receive their first opportunity to challenge overvaluation in Kansas following the receipt of their final correlated unit valuations from the Director of the DPV. At this time, each railroad has an opportunity to request a hearing with the Director in order to discuss, criticize or request a change in the final valuation figure. After the hearing, the railroads are notified of their final unit value. The court recognizes that this is often an ineffective practice for the railroads, particularly when they seek to challenge the procedures utilized by the DPV to make their calculations. However, Kansas law does provide the railroads with an opportunity to challenge their valuation before the Kansas Board of Tax Appeals. K.S.A. 74-2438. Then, if they are not satisfied with the decision reached by the Board of Tax Appeals, they may seek relief in state court. K.S.A. 74-2426.

Here, the Burlington Northern plaintiffs did not challenge their valuations before the Board of Tax Appeals within the prescribed time limits of K.S.A. 74-2438. Thus, it appears that the railroads are precluded from challenging their valuations under K.S.A. 74-2438. However, it does appear that an alternative is available to the railroads, the tax protest procedures of K.S.A. 79-2005. K.S.A. 79-2005 allows a taxpayer in Kansas to pay his tax under protest and then challenge the tax before the Board of Tax Appeals. There was some question raised during the instant hearing as to whether the railroads could, like other taxpayers in Kansas, use the pay under protest procedures of K.S.A. 79-2005. This issue arose in the 1980 tax case and we stated the argument of the parties as follows:

> The plaintiffs contend that a recent amendment (Chapter 315 of the 1980 Kansas Session Laws) to K.S.A. § 79-2005, the Kansas tax protest provision, has eliminated their remedy. The amended version of K.S.A. § 79-2005 contains a new subsection which reads:
>
> > (n) *This statute shall not apply to the valuation and assessment of property assessed by the director of property valuation* and it shall not be necessary for any owner of state assessed property who has an appeal pending before the board of tax appeals, to protest the payment of taxes under this statute solely for the purpose of protecting the right to a refund of taxes paid under protest should that owner be successful in that appeal. (Emphasis added.)
>
> The plaintiffs rely on the language underlined above for their position that subsection (n) forecloses the use of K.S.A. § 79-2005 to the railroads. It is the defendants' position that this subsection, read in its entirety, does not exclude the use of this remedy by the plaintiff railroads. They assert that if plaintiffs' contention were correct, it would be impossible for the owner of state assessed property to pay his taxes under protest. Furthermore, they believe that the plaintiffs' position would make much of subsection (n) contradictory and meaningless.
>
> We concluded:
>
> The court is in full agreement with the defendants when they state that subsection (n) is "not the model of legisla-

tive clarity." It is indeed a rather confusing and poorly written piece of legislation. This court believes that subsection (n) must be read as interpreted by the defendants. The legislative history of the amendment to K.S.A. § 79-2005 supports the conclusion that subsection (n) was not intended to eliminate the right of railroads to use the protest and refund procedures of K.S.A. § 79-2005.

Thus, we believe that the railroads have the procedures under K.S.A. 79-2005 available to them as an option to challenge their valuation.

CONCLUSION

This memorandum thoroughly discusses the rulings made in our order of December 1, 1982. We hope it is some assistance in understanding that order.

Dated this 9th day of December, 1982, at Topeka, Kansas.

/s/ Richard D. Roger
RICHARD D. ROGER
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 82-1561

BURLINGTON NORTHERN RAILROAD COMPANY, et al.,
Plaintiffs,

vs.

C. MICHAEL LENNEN, et al.,
Defendants.

Case No. 82-1562

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., et al.,
Plaintiffs,

vs.

C. MICHAEL LENNEN, et al.,
Defendants.

FILED
DEC 1 1982

ORDER

The above-mentioned cases are more in a series of lawsuits brought by the railroads operating in the State of Kansas alleging that the defendants are violating Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act), now codified at 49 U.S.C. § 11503. These cases are presently before the court upon the plaintiffs' motions for preliminary injunction. The court has taken evidence and heard arguments on these motions and is now prepared to rule.

The court shall issue this rather short order and then follow it up in the next few days with a more detailed memorandum. This procedure will enable the plaintiffs to pay the first half of their 1982 taxes, which are due on December 20, in a timely fashion.

In the past, the railroads have sought relief under Section 306 of the 4-R Act for the 1979, 1980 and 1981 tax years. In the instant cases, the railroads seek tax relief for the 1982 tax year. In *Atchison, Topeka & Santa Fe Railway Co.* v. *Lennen*, Case No. 82-1562, five interstate railroads seek equalization relief under Section 306 similar to that requested in prior actions. In *Burlington Northern Railroad Co.* v. *Lennen*, Case No. 82-1561, six interstate railroads seek equalization relief under Section 306 as well as relief from alleged overvaluation.

The court shall first consider the issue of equalization relief. The parties have stipulated that the court may consider the evidence presented in the 1981 tax case on the issue of equalization relief for the purposes of determining that issue in these cases. Based upon that evidence, the court will sustain the plaintiffs' motion for preliminary injunction on their request for equalization relief and enter an order similar to those entered in the 1981 tax case.

The court shall now consider the issue of valuation. In prior cases, the railroads have accepted, for the purposes of their Section 306 cases, the defendants' system valuations of their property. In Case No. 82-1561, the railroads do challenge the defendants' 1982 system valuations and allege that those valuations substantially exceed true market value. The railroads assert that the overvaluations occurred in apparent retaliation for the relief granted to them by this court in their 1980 tax case. The defendants have argued that the court has no jurisdiction under Section 306 to consider the proper valuation of the railroads.

After carefully examining the issue of valuation, the court finds from a thorough review of the legislative history of Section 306 that Congress did not generally intend the courts to

examine the issue of the valuation of the railroads in actions brought under Section 306. However, we do believe that the court has jurisdiction to consider a situation where a state attempts to circumvent Section 306 by overvaluing a railroad in retaliation for past relief accorded under Section 306 of the 4-R Act. After carefully reviewing the evidence presented in this case, we do not find that the railroads have demonstrated reasonable cause to believe that a violation of Section 306 has occurred on the issue of valuation. The railroads have failed to adequately show that any increase in the valuation of their rail transportation property was due to improper motivation by the defendants. Further, even assuming that the court could consider an ordinary overvaluation case under Section 306, we do not find that the railroads have shown that the defendants overvalued their property under the guidelines established by Kansas law. In sum, we refuse to grant any relief to the plaintiffs based on alleged overvaluation. We intend to elaborate upon these findings in our later memorandum.

IT IS THEREFORE ORDERED that the plaintiffs' motion for a preliminary injunction in Case No. 82-1562 be hereby granted.

IT IS FURTHER ORDERED that the plaintiffs' motion for a preliminary injunction in Case No. 82-1561 be hereby granted in part and denied in part.

IT IS FURTHER ORDERED that defendants, their successors, their agents or employees, and those in active concert or participation with them are preliminarily enjoined and restrained until further order of this court, from collecting those portions of the property tax payments from the plaintiff railroads that are in dispute in this litigation; the portion in dispute amounts to 61% of the plaintiffs' 1982 property taxes. The defendants, their agents or employees, and those in active concert or participation with them shall refrain from taking any action to collect those portions of plaintiffs' first half 1982 taxes that are in dispute in this litigation or to penalize the plaintiffs for their failure to pay any portion of the taxes withheld with the court.

The defendants are advised that this injunction applies to the collection of taxes assessed on all railroad transportation property owned by the following plaintiffs:

The Atchison, Topeka, and Santa Fe Railway Company;

Burlington Northern Railroad Company;

Chicago and Northwestern Transportation Company;

Chicago, Rock Island, and Pacific Railroad Company;

The Kansas City Southern Railway Company;

The Kansas and Missouri Railway and Terminal Company; Kansas City Terminal Railway Company;

Missouri-Kansas-Texas Railroad Company;

Missouri-Pacific Railroad Company;

St. Louis-Southwestern Railway Company; Union Pacific Railroad Company; and

St. Joseph and Grand Island Railway Corporation.

Plaintiff, Chicago, Rock Island, and Pacific Railroad Company is unable to tender payment of any part of its taxes because of proceedings for reorganization of the company pending in the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS FURTHER ORDERED that this injunction shall apply to the county treasurers of the State of Kansas and they shall refrain from taking any action to collect plaintiffs' first half 1982 property tax or to penalize the plaintiffs for their failure to pay any portion of the taxes withheld.

IT IS FURTHER ORDERED that each of the plaintiffs, with the exception of the Chicago, Rock Island and Pacific Railroad Company, submit a verified financial statement establishing sufficient net worth to indemnify the defendants and all affected Kansas counties from any damages or taxes later determined to be due should this preliminary injunction be found to have been wrongfully obtained in whole or in part.

IT IS FURTHER ORDERED that this preliminary injunction shall be effective until further order of the court.

IT IS FURTHER ORDERED that the clerk of the court serve this order on all of the county treasurers in the State of Kansas, in addition to the parties in this case.

IT IS SO ORDERED.

Dated this 1st day of December, 1982, at Topeka, Kansas.

/s/ Richard D. Rogers
RICHARD D. ROGERS
United States District Judge

APPENDIX D

SEPTEMBER TERM - September 28, 1983

Before Honorable Oliver Beth, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges.

No. 82-2534

BURLINGTON NORTHERN RAILROAD COMPANY, *et al.*
Plaintiffs-Appellants,

vs.

C. MICHAEL LENNEN, *et al.*,
Defendants-Appellees.

This matter comes for consideration of Appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied. Judge William J. Holloway, Jr., took no part in these proceedings.

/s/ Howard K. Phillips, Clerk
HOWARD K. PHILLIPS, CLERK

APPENDIX E

SEPTEMBER TERM - October 13, 1983

Before Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

No. 82-2534

BURLINGTON NORTHERN RAILROAD COMPANY, *et al.*
Plaintiffs-Appellants,

v.

C. MICHAEL LENNEN, *et al.*
Defendants-Appellees.

This matter comes on for consideration of appellants' motion for stay of mandate in the captioned cause pending application to the Supreme Court for certiorari.

Upon consideration whereof, it is ordered that the mandate shall be stayed until November 14, 1983, pending certiorari and that if on or before that date there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that the appellant has timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

HOWARD K. PHILLIPS, Clerk

/s/By Robert L. Hoecker
ROBERT L. HOECKER
Chief Deputy Clerk

APPENDIX F

PROHIBITING DISCRIMINATORY TAX TREATMENT OF TRANSPORTATION PROPERTY

SEC. 306. Part I of the Interstate Commerce Act (49 U.S.C. 1 et seq.), as amended by this Act, is further amended by inserting therein a new section 28, as follows:

[49 USC 26C.] "SEC. 28. (1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

"(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

"(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

"(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the name assessment jurisdiction.

"(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

[District courts, jurisdiction.] "(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equi-

table relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that—

"(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

"(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

"(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

"(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

"(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

"(3) As used in this section, the term—[Definitions.]

"(a) 'assessment' means valuation for purposes of a property tax levied by any taxing district;

"(b) 'assessment jurisdiction' means a geographical area, such as a State or a county, city township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

"(c) 'commercial and industrial property' or 'all other commercial and industrial property' means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

"(d) 'transportation property' means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation.".

APPENDIX G

§ 11503. Tax discrimination against rail transportation property

(a) In this section—

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the

jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

Pub.L. 95-473. Oct. 17, 1978, 92 Stat. 1445.

APPENDIX H

NOVEMBER TERM—DECEMBER 17, 1982

Before Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges.

No. 82-2534

BURLINGTON NORTHERN RAILROAD COMPANY, *et al.*,
Plaintiffs-Appellants,

THE KANSAS AND MISSOURI RAILWAY AND TERMINAL COMPANY,
Plaintiff,

vs.

C. MICHAEL LENNEN, *etc., et al.*,
Defendants-Appellees,

BOURBON, DECATUR, ELK, FRANKLIN, GOVE, LANE, LINN, MARSHALL, MIAMI, NORTON, PHILLIPS and PRATT COUNTIES, KANSAS,
Intervenors.

This matter comes on for consideration of the emergency motion of the plaintiffs-appellants, Burlington Northern Railroad Company, et al. for entry of an injunction pending appeal to restrain the defendants and all persons acting in concert with them from levying or collecting first half taxes on tax payers' property which are due December 20, 1982, on the grounds that the defendants have over valued the plaintiffs' property for ad valorem tax purposes in violation of § 306 of P.L. 94-210, 90 Stat. 54, Feb. 5, 1976 (codified at 49 U.S.C.A. § 11503).

Upon consideration whereof, it is the order of the Court as follows:

It is ordered that the temporary injunction shall issue as requested. The defendants-appellees, C. Michael Lennen, Secretary of Revenue of the Department of Revenue of the State of Kansas, etc., and the parties named with him in the caption of this order, and their successors, their agents or employees and all in active concert or participation with them, are enjoined and restrained until the further order of this Court from collecting the first half of plaintiffs-appellants' 1982 property taxes on any portion in excess of the value assigned to such property by the defendants for the 1981 tax year.

It is further ordered that the defendants-appellees, C. Michael Lennen, et al., named in the caption of this order shall file a response with the Clerk of this Court on or before December 28, 1982, and show cause why the temporary injunction entered this date should not be made permanent pending appeal.

The Clerk of this Court shall notify the attorneys of record of the existence of this order by telephone this date and by mailing copies hereof to said attorneys.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX I

Pursuant To Rule 28.1 Of The Revised Rules Of The United States Supreme Court, A List Of Parent, Subsidiaries (Other Than Wholly Owned) And Affiliated Companies Of Each Petitioner Is Set Forth Below:

Burlington Northern Railroad Company is a wholly owned subsidiary of Burlington Northern Inc. Its subsidiaries which are not wholly owned are:

The Belt Railway Company of Chicago (7.69%)
Camas Prairie Railroad Company (50%)
Chicago Union Station Company (25%)
Davenport, Rock Island and North Western Railway Company (50%)
The Denver Union Terminal Railway Company (33.33%)
Galveston Terminal Railway Company (50%)
Houston Belt & Terminal Railway Company (12.5%)
Iowa Transfer Railway Company (25%)
Kansas City Terminal Railway Company (16.67%)
Keokuk Union Depot Company (40%)
The Lake Superior Terminal and Transfer Railway Company (66.67%)
Longview Switching Company (33.33%)
The Minnesota Transfer Railway Company (33.33%)
Paducah & Illinois Railroad Company (33.33%)
Portland Terminal Railroad Company (40%)
The Pueblo Union Depot and Railroad Company (25%)
The Saint Paul Union Depot Company (40.2%)
Terminal Railroad Association of St. Louis (12.5%)
Trailer Train Company (9.76%)
The Wichita Union Terminal Railway Company (33.33%)
Winona Bridge Railway Company (66.67%)

Its affiliates are:

BN Financial Services Inc.
Burlington Northern Airmotive Inc.
Burlington Northern International Services Inc.
Burlington Northern Trading Company Inc.
Colt Intermodal Inc.

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* Publicly Traded

Glacier Park Company
Dreyer Bros., Inc.
Glacier Park Boulder Company
Glacier Park Denver Company
Tennessee Glacier Park Company
Washington Glacier Park Company
Glacier Park Liquidating Company
Meridian Land & Mineral Company
Milestone Petroleum Inc.
Butte Pipe Line Company (10%)
Northern Rockies Pipe Line Co.
Osage Milestone Petroleum Inc.
Portal Pipe Line Company (50%)
Saxony Corporation
New Mexico and Arizona Land Company (50%)
NZ Development Corporation
NZ Properties, Inc.
Plum Creek Timber Company, Inc.
R-H Holdings Corporation
The El Paso Company (48%)

The Union Pacific Railroad Company and the Missouri Pacific Railroad Company are the wholly owned subsidiaries of Pacific Rail Systems, Inc. which in turn is the wholly owned subsidiary of Union Pacific Corporation. Their subsidiaries (except wholly owned) and affiliates are:

Bear Creek Uranium Company
Black Butte Coal Company
Camas Prairie Railroad Company
Carbon County Coal Company
Corpus Christi Petrochemical Company
The Denver Union Terminal Railway Company
Esperanza Pipeline Company
Ferguson-Burleson County Gas Gathering System
Frontier Pipeline
Jefferson Southwestern Railroad Company
Kansas City Terminal Railway Company
Longview Switching Company
M-C Carbon Partnership
Medicine Bow Coal Company
The Ogden Union Railway and Depot Company
Portland Traction Company
Portland Terminal Railroad Company
The St. Joseph and Grand Island Railway Company

Southern Illinois and Missouri Bridge Company
St. Joseph Terminal Railroad Company
Stansbury Coal Company
Stauffer Chemical Company of Wyoming
Trailer Train Company
Unita Development Company
Union Pacific Resources Ltd.
The Weatherford Mineral Wells and Northwestern Railway Company

Kansas City Southern Railway Company is the wholly owned subsidiary of Kansas City Southern Industries, Inc. It has no subsidiaries which are not 100% owned. Its affiliates are:

Joplin Union Depot
Kansas City Terminal Railway Company
Trailer Train Company
Veals, Inc. (wholly owned by Kansas City Southern Industries, Inc.)
Carland, Inc. (wholly owned by Kansas City Southern Industries, Inc.
* DST, Inc. (86% owned by Kansas City Southern Industries, Inc. and 14% publicly traded)
Wall Street Clearing
Boston Financial Data Service
Investors Fiduciary Trust Company
Portico
DST Computer Services
Pioneer Western (wholly owned by Kansas City Southern Industries, Inc.)
Pabtex, Inc. (wholly owned by Kansas City Southern Industries, Inc.)
Rice-Carden Corporation (wholly owned by Kansas City Southern Industries, Inc.)
Mid-America Television Company (wholly owned by Kansas City Southern Industries, Inc.)
The American-Coleman Company (wholly owned by Kansas City Southern Industries, Inc.)
Rycom Instruments, Inc.
Lonestar-KC Concrete Tie Company
LDX Group, Inc. (74% owned by Kansas City Southern Industries, Inc.)

The Missouri-Kansas-Texas Railroad Company is the wholly owned subsidiary of its parent Katy Industries, Inc.